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The Long and Winding Road: Case Comment on *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[1]

Bryan P. Schwartz and Darla L. Rettie*

I. OVERVIEW

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Court addressed the tension in the numbered treaties between the right of First Nations to hunt and fish as before and the authority of governments to "take up" land for settlement and other purposes. The Court decided that the Crown must engage in a meaningful process of consultation and accommodation when a contemplated "taking up" may have an adverse effect on the exercise of a First Nation's treaty rights. These duties apply regardless of whether the "taking up" is so substantial as to amount to a *prima facie* infringement of a treaty right.[2]

This framework for consultation adopted by the Court was the one adopted in two recent cases involving the rights of First Nations that had not yet been proved: *Haida Nation v. British Columbia (Minister of Forests)*[3] and *Taku River Tlingit First Nation v. British Columbia*

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1 [2005] S.C.J. No. 71, 2005 SCC 69 [hereinafter "*Mikisew v. Canada"*].

2 The decision in *Mikisew v. Canada* clarifies that the proper analytical path is not to jump into the *Sparrow* rights infringement analysis without first determining whether procedural process requirements have been met, see para. 59.

3 [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 [hereinafter "*Haida*"].

(Project Assessment Director).[4] The Supreme Court held in these cases that the Crown's obligation to consult flows from the honour of the Crown.

It remains to be explored in future cases whether the *Haida* framework is significantly different than that used for addressing cases of outright substantive infringement of rights — first outlined in *R. v. Sparrow*, and subsequently refined in *R. v. Badger*.[5] Both the *Haida* and *Sparrow* frameworks are flexible. The scope of the Crown's obligations to consult and accommodate, in both situations, will depend on such factors as the seriousness of the adverse effect on the exercise of rights (or claimed rights). The application of the *Haida* framework in a particular situation may be sufficient to establish that Crown action is unlawful, and thereby make the application of the *Sparrow* test moot.[6]

The judgment of the Supreme Court in *Mikisew v. Canada* invites at least two questions:

- Why did the Court choose to adopt a preliminary process analysis instead of directly applying the *Sparrow* infringement test, as it had done in *Badger*, where another treaty right (to hunt, fish and trap) was in tension with a Crown authority recognized in the treaty?
- Why did the Court not define with some precision what level of interference with the exercise of a treaty right amounts to an infringement that triggers the application of the *Sparrow* test?

II. BACKGROUND

The case of *Mikisew v. Canada* is essentially about a proposed and approved 118-kilometre winter road, designed to track alongside the Mikisew Cree First Nation Peace Point Reserve. The journey to achieve recognition that it was entitled to direct consultation on the proposed road took the Mikisew Cree First Nation ("Mikisew") six years, and three court proceedings.[7] In the end, the Minister's road approval order

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[4] [2004] S.C.J. No. 69, 2004 SCC 74 [hereinafter "*Taku*"].

[5] [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 [hereinafter "*Sparrow*"]; [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 [hereinafter "*Badger*"].

[6] *Mikisew v. Canada, supra*, note 1, para. 57.

[7] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1877 (T.D.) [hereinafter "*Mikisew*, Trial Division"], [2004] F.C.J. No. 277 (C.A.) [hereinafter "*Mikisew*, Court of Appeal"], reversing Federal Court decision.

was quashed on the basis that the Crown had failed to engage in a direct and meaningful consultation process, prior to authorizing construction.

The Mikisew are signatories to Treaty No. 8, under which they surrendered 840,000 sq km of land to Crown, in exchange for reserve land, and the right to hunt, fish and trap on the surrendered land. Rights explicated in Treaty No. 8 are subject to a number of internal limitations — including the Crown's right to "take up" land for settlement, trading, resources, or similar purposes:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing *throughout the tract surrendered* as before described, *subject to such regulations* as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, *and saving and excepting such tracts as may be required or taken up* from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.] (Report of Commissioners for Treaty No. 8 (1899), at p.12)[8]

Initially, the Minister of Canadian Heritage approved a routing of the winter road that ran directly through Mikisew Cree First Nation Peace Point Reserve, which is wholly contained within Wood Buffalo National Park. The park itself is entirely within the area covered by Treaty No. 8.[9] The decision was made absent any direct consultation with the Mikisew. Instead, the government held open houses, inviting public comment.

After the Mikisew protested, the road alignment was changed to track around the reserve rather than through it, although it was still within the traditional territories of the Mikisew. Again, this decision was reached without direct consultation with the affected First Nation, nor did the evidence establish that any consideration was given to whether the new route would minimize impacts on the Mikisew's treaty rights.[10] The Minister ultimately approved a 200-metre wide, 23 square kilometre road corridor in which use of firearms would be prohibited.[11]

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[8] As cited in *Mikisew v. Canada*, *supra*, note 1, para. 2.

[9] See *Mikisew*, Trial Division, *supra*, note 7, para. 7-8; *Dominion Forest Reserves and Parks Act*, S.C. 1911, c. 10, as amended.

[10] *Mikisew v. Canada*, *supra*, note 1, para. 20.

[11] Under s. 36(5) of the *Wood Buffalo National Park Regulations*, SOR/78-830, the road would require a 200-metre corridor in which the use of firearms would be prohibited.

Although the communities within the park itself are rather small, the residents in those communities participate in traditional hunting and trapping. The proposed route ran through registered trapping areas and moose hunting grounds. At trial, Hansen J. found that approximately 14 Mikisew families who trap and 100 Mikisew hunters would be adversely affected by the road, which the Court found to be a significant number, within the context of remote northern communities of relatively few families.[12]

At trial, Hansen J. applied the infringement test outlined in *Sparrow,* and found public notices were not sufficient as the Mikisew were entitled to direct consultation. The infringement was not justified, and the order was quashed.

The majority of the Court of Appeal reversed on argument that Treaty No. 8 expressly contemplated the "taking up" of surrendered lands for various purposes — including roads — and that such a "taking up" was a proper exercise of the Crown's right under the treaty rather than a treaty infringement.

The majority judgment held that:

> …with the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt.[13]

The test of "no meaningful right to hunt" was invented for the occasion by the majority in the Court of Appeal. On this basis, the majority of the Court of Appeal found no obligation to consult, and the *Sparrow* test was not considered. It should be noted that the decision was delivered before the release of the Supreme Court's decisions in *Haida* and *Taku*.

The Supreme Court agreed with the trial judge that the proposed corridor would affect the Mikisew's ability to exercise their right to hunt and trap. The Crown's suggestion that the test should be whether the Mikisew were able to practically exercise their right within the province "as a whole" was rejected as untenable, as was the Attorney General's suggestion that the infringement of 23 sq km was *de minimus.*[14]

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12 *Mikisew v. Canada*, *supra*, note 1, para. 3.

13 *Mikisew*, Court of Appeal, *supra*, note 7, para. 18.

14 *Mikisew v. Canada*, *supra*, note 1, paras. 45, 47.

The Court held the Crown had not discharged its procedural duty to engage directly with the applicant in consultation, or to minimize the adverse impacts of the winter road on its hunting, fishing, and trapping rights. On this basis, the case was sent back to the Crown for further consultation and consideration.

III. Realignment of Court Analysis in Treaty Matters

1. Starting Point in Analysis — Have Process Rights Been Observed?

Although Treaty No. 8 clearly contemplates a number of limitations on the right to hunt/fish/trap — *i.e.*, when lands are "taken up" — the historical context of Treaty No. 8, and the tensions underlying treaty interpretation, require the Crown to engage in a *process* when it seeks to "take up" land that is currently available for treaty guaranteed purposes. A transfer process without consultation, the Court concludes, would not adequately respect the treaty rights of First Nations to hunt, fish and trap.[15] On this basis, the Court held the Mikisew had a right to consultation and accommodation at a preliminary stage of project consideration, the content of which turned on the degree to which their treaty rights would be affected by the proposed road.

In reaching its conclusion, the Court rejects the position of the majority of the Court of Appeal: that a treaty right to "take up" land is a right to take unilateral action, save for the instances where it can be shown that no meaningful amount of land remains or that the Crown has acted in bad faith.[16] The Court found this position untenable, as it would ignore situations where such action would significantly and adversely affect Aboriginal interests.

With its decision in *Mikisew v. Canada*, the Court built on similar holdings in *Delgamuukw v. British Columbia*,[17] *Sparrow*, *Badger*, *Haida* and *Taku*, when it stated that the Crown's procedural duty to consult is grounded in the honour of the Crown — which is a distinct source of obligation that exists independent of the text of any specific treaty. As such, the honour of the Crown may be invoked as a central principle in

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15 *Id.*, para. 54.

16 *Id.*, para. 48.

17 [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 [hereinafter "*Delgamuukw*"].

resolving Aboriginal claims to consultation.[18] In the instant case, the Court stated:

> [T]he honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (*e.g.* consultation) as well as substantive rights (*e.g.* hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

The threshold test for triggering a procedural duty to consult is low; the Court will imply some consultation obligations when Crown conduct "might adversely affect" a treaty right.[19] What is variable is the *content* of the Crown's duty to engage in a consultation/accommodation process. Once engaged, the scope of required consultation, within the treaty context, is predicated on a number of factors including:

- the clarity of promises made under the treaty;
- the seriousness of impact of proposed Crown actions;
- the history of dealings between the Crown and the particular First Nation; and
- whether the treaty provides a framework to manage foreseen changes in land use.[20]

Based on the strength of the listed factors, the Crown's obligations will fall somewhere within the consultation spectrum, first outlined in *Delgamuukw*. In the instant case, the Crown's procedural duty to consult was found to be at the lower end of the spectrum.

In *Mikisew v. Canada*, the Court makes explicit reference to what adequate low level consultation would involve: giving notice, offering

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[18] See *Mikisew v. Canada*, *supra*, note 1, paras. 51, 57. The failure of the Crown to engage in a process of direct consultation offends two core treaty interpretation principles:

- it undermined the fundamental objective of modern treaty right analysis — reconciliation of competing Aboriginal and non-Aboriginal claims; and
- it undermined the Crown's obligation to act honourably in its dealings with First Nations.

[19] *Mikisew v. Canada*, *supra*, note 1, para. 57 (emphasis in original).

[20] *Id.*, para. 63.

direct engagement, providing information addressing relevant concerns and potential adverse effects, soliciting feedback, and attempting to minimize adverse impacts.[21]

Although the Court takes pains to state that the consultation process would not have given the Mikisew a veto over the road alignment, the content of the right is expressly more substantial than low-end consultation rights identified in *Haida,* which merely required the Crown to give notice, disclose information, and discuss issues raised in response to the notice,[22] or in *Delgamuukw*, where at the low end of the spectrum, the Court identified that the duty to consult may be no more than the obligation to discuss important decisions that will be taken, with respect to lands held under Aboriginal title.[23]

The more exacting the obligations, the less flexibility the government may ultimately have when designing consultation policies or regulatory mechanisms that will meet the minimums stated within relevant decided cases.

2. Possible Reasons for the Analytical Shift

The recognition of a duty to consult in the context of "taking up" cases, in *Mikisew v. Canada*, adds to the scope of obligations to consult and accommodate flowing from the "honour of the Crown". The *Sparrow* framework applies to actual infringements of Aboriginal and treaty rights, rights under the Natural Resources Transfer Agreements, and to the regulation of hunting and fishing rights under the numbered treaties. The *Haida* framework applies to claimed but as yet unproved rights and to contemplated "takings up" of land under the numbered treaties. The Court's recognition of the last-mentioned duty clearly flowed in part from its view that a failure to do so in cases like *Mikisew v. Canada* would amount to a high-handedness in dealing with constitutionally protected rights.

The question that naturally arises, however, is why the Court chose to invoke the *Haida* rather than the *Sparrow* framework in the context of "takings up", in contrast to its earlier approach to another treaty pairing

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21 *Id*., para. 64.

22 *Haida*, *supra*, note 3, paras. 43-45.

23 *Delgamuukw*, *supra*, note 17, para. 168.

(rights to hunt and fish, subject to the Crown's right to regulate) in *Badger*.[24]

We speculate that the Court may have chosen to engage in a *Haida* framework analysis for a number of reasons:

1. The *Sparrow* framework explicitly says compensation may be a factor in some cases.

2. The Court may have tried to steer clear of any need to consider compensation on the basis of its belief that this matter is best dealt with initially as part of the negotiation process between parties. At the trial level, Hansen J. chose *not* to consider the adequacy of the *ex gratia* payments that had been offered by the Crown, in light of her finding on the inadequacy of the consultation.[25]

3. There may have been some reluctance to deal with compensation, as the Court might have been concerned about whether this might amount to the Crown paying for the same thing (the right to take up land for settlement) twice — initially, when the treaty was signed, and then later on in the context of an actual development.

   In reality, two stages of compensation — one at the time of the treaty, another in the context of an actual taking up of land — might actually be entirely appropriate in some cases. The treaty right might be viewed as generally authorizing the Crown to share the land, with additional compensation acquired only if and when Crown use of the land has a significant adverse effect. While wrestling with the issue of compensation may have been one reason for the Court to steer clear of the *Sparrow* test, it is not by any means clear that the same issue will not arise in the context of the *Haida* framework. In some cases, a First Nation might successfully argue that compensation — which might be in the form of revenue sharing from a development — is part of the necessary accommodation.

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[24] Interveners, including the Assembly of First Nations, argued that the Crown's right to "take up" land should be exercised in accordance with the *Sparrow* test, because like in *Badger*, this case involved both a right and a qualification of that right. The consistent and logical approach, it was argued, would be to treat all right/qualification couplings in a consistent manner, whether that qualification is the right of the Crown to pass regulations, take up land, or expropriate.

[25] *Mikisew*, Trial Division, *supra*, note 7, para. 78.

4. The Court may be adopting a more cautious approach to the recognition of Aboriginal and treaty rights in the aftermath of the political backlash against its decision in *R. v. Marshall*.[26] The Court may have been concerned about the consequences of finding, as the British Columbia Court of Appeal held in *Halfway River First Nation v. British Columbia (Ministry of Forests)*,[27] that every "taking up of land for settlement" should be viewed as tantamount to an infringement of a treaty right. It may have been concerned that such an approach would lead in some subsequent cases to judicial decisions that would unduly (from the perspective of the Court) impair the ability of provincial governments to manage and develop Crown lands.

5. The negotiating record of Treaty No. 8 includes statements by the Crown that could be construed as promising that the taking up of land would not have a significant impact on the exercise of treaty rights. At the time of the treaty, even the Crown did not expect a large influx of settlers into the Treaty No. 8 area. The judgment of the Supreme Court of Canada acknowledges the point, but focuses on the written text of the treaty to conclude that "change" was indeed contemplated.[28] By resting the judgment on the issue of consultation at the preliminary and planning stage, and avoiding the question of when a substantive infringement of the treaty right to hunt occurs, the Court was able to avoid delving deeply into an arguable large tension between the oral and written versions of the treaty.

IV. WHEN DOES THE "TAKING UP" OF LAND INTERFERE SO SIGNIFICANTLY WITH TREATY RIGHTS TO HUNT, FISH AND TRAP THAT THE *SPARROW* TEST FOR INFRINGEMENTS IS APPLICABLE?

The central issue before the Supreme Court was whether the proposed "taking up" of lands was subject to the *Sparrow* infringement test. Both sides argued that their interpretation of the Court's decision in *Badger* ought to be determinative.

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26 [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 [hereinafter "*Marshall*"].

27 [1999] B.C.J. No. 1880, 1999 BCCA 470 [hereinafter "*Halfway River*"].

28 *Mikisew v. Canada, supra*, note 1, para. 31.

In considering when exactly a "taking up" would amount to a treaty infringement, requiring strict justification under the *Sparrow* test, the Court starts by identifying a basic principle: not every "taking up" under Treaty No. 8 will amount to a treaty infringement.

In furtherance of this statement, the Court rejects the holding in *Halfway River* that *any* interference with the right to hunt is a *prima facie* infringement which must be justified under the *Sparrow* test.[29]

This statement should not be over-read as meaning that a *Sparrow* analysis is not applicable in "taking up" cases. The Court suggests quite the contrary, in the *Mikisew v. Canada* decision. The Court states that in cases involving a proposed "taking up" it will *first* consider the process by which the "taking up" is planned, *before* it moves to a *Sparrow* analysis.[30]

After *Mikisew v. Canada*, a contemplated government action may be quashed based on either of two grounds: based on a procedural ground — whether or not the facts would have supported a finding of infringement of hunting, fishing or trapping rights — or on a substantive ground, through a *Sparrow* analysis of the proposed infringement.

What the Court does not do is create a clear picture of *when a Crown measure is sufficiently disruptive as to constitute a substantive infringement requiring Sparrow justification*. It gives some guidance, when it concludes if a particular Treaty No. 8 First Nation is left with no "meaningful right to hunt" over its traditional territories, that First Nation would clearly have a potential action for treaty infringement.[31] But what about instances between "adverse impact" (*Sparrow* threshold requirement to prove *prima facie* infringement)[32] and "no meaningful right left"? The Court was equally unclear on whether, in the instant case, an application of the *Sparrow* test would have been appropriate if the Crown had attempted to justify its consultation in *Sparrow* terms.[33]

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29 *Mikisew v. Canada*, *supra*, note 1, para. 32.

30 *Id.*, para. 59.

31 *Id*., para. 48.

32 See recent judicial interpretations in *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723; *R. v. Coté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139.

33 *Mikisew v. Canada*, *supra*, note 1, para. 58.

V. CONCLUSION

Mikisew v. Canada leaves some unanswered questions that might have to be addressed in later cases. The Court will have to further refine the applicability of *Sparrow*, in cases where there has been a "taking up" and in other rights contexts. As the duty to accommodate is only referenced in passing (Crown must attempt to minimize adverse impacts) there is no clear indication of what *level of accommodation* would be necessary based on the facts in the instant case.

In practice, the decision of the Court may encourage federal and provincial governments to reach more negotiated agreements with First Nations on contemplated development. By doing so, federal and provincial governments will avoid the legal risk associated with proceeding in circumstances where an affected First Nation does not believe it has been adequately consulted or accommodated. Such agreements may involve elements such as co-management of environmental issues and sharing in the revenues produced by economic development. As in many other cases involving First Nations, the Court was not so much interested in imposing specific outcomes, either in the case actually up for adjudication or in future cases, as in establishing a framework for reconciliation of competing rights and interests through dialogue and mutual accommodation.